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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 234

CONTINENTAL OIL COMPANY,
Petitioner,

v.

STEWART L. UDALL,
Secretary of the Interior,
and
PHILLIPS PETROLEUM COMPANY AND
AZTEC OIL & GAS CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

OPINIONS BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTES AND REGULATIONS INVOLVED 3
STATEMENT OF THE CASE 6
REASONS FOR GRANTING THE WRIT 8
APPENDIX:
Judgment of the Court of Appeals A1
Denial of Rehearing A2

AUTHORITIES

CASES:

Coleman v. United States, 363 F.2d 190 11
Crowell v. Benson, 285 U.S. 22 12
Interstate Commerce Commission v. Louisville & Nashville Railroad Company, 227 U.S. 88 12
National Broadcasting Co. v. United States, 319 U.S. 190 13
National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Company, 308 U.S. 241 13
Norris & Hirshberg v. Securities and Exchange Commission, 163 F.2d 689, certiorari denied 333 U.S. 867 13
Ohio Bell Telephone Company v. Public Utilities Commission of Ohio, 301 U.S. 292 11
United States v. Abilene & S.R. Co., 265 U.S. 274 12
United States v. Baltimore & Ohio Southwestern Railroad Company, 226 U.S. 14 11
United States v. Carlo Bianchi & Co., 373 U.S. 709 12

ADMINISTRATIVE OPINIONS:

Appeal of Continental Oil Company,
68 I.D. 337 1

STATUTES:

60 Stat. 243, 5 U.S.C. § 1009 . . . . . 4, 5, 8

52 Stat. 347, 25 U.S.C. § 396a 3

52 Stat. 347, 25 U.S.C. § 396b 3

62 Stat. 929, 28 U.S.C. § 1254(i) 2

62 Stat. 964, 28 U.S.C. §§ 2201, 2202 8

District of Columbia Code, Title XI, Section 306 8

CONSTITUTIONAL PROVISIONS:

United States Constitution
Fifth Amendment 5

REGULATIONS:

25 C.F.R. § 171.8 . . . . . 4, 11

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AZTEC OIL & GAS CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

Neither the Court of Appeals nor the District Court rendered an opinion in this cause. The District Court did enter certain Findings of Fact and Conclusions of Law (Joint Appendix, p. 165). The opinion of the Secretary of the Interior (Joint Appendix, p. 38) is officially reported in Decisions of the United States Department of the Interior. *Appeal of Continental Oil Company*, 68 I.D. 337 (1961).

JURISDICTION

Petitioner requests that a writ of certiorari be granted to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on February 10, 1967 (Appendix, p. A1). A petition for rehearing requested by Petitioner was denied by order dated March 15, 1967 (Appendix, p. A2). The jurisdiction of this Court rests on 62 Stat. 929, 28 U.S.C. § 1254(1)

QUESTIONS PRESENTED

In 1953 Petitioner was the high bidder for oil and gas leases on two tracts of unsurveyed land in the Navajo Indian Reservation. Each tract was described in the leases by metes and bounds and then went on to say that the tract "when surveyed probably will be described as follows:," thereafter enumerating certain sections. Notwithstanding the obvious meaning of these descriptions the Secretary of the Interior determined, as a matter of administrative discretion and in disregard of recognized legal standards, that the leases did not cover the lands described by metes and bounds but covered a lesser area of land delineated by the enumerated sections. The sections were determined by an official survey conducted after the lease sale.

Following this adverse determination by the Secretary, Petitioner brought an action for review under the Administrative Procedure Act in the United States District Court for the District of Columbia. When the Secretary submitted the administrative record to the court he included, over objection by Petitioner, certain interoffice memos and letters which did not comprise part of the administrative record, which were not made known to Petitioner during the administrative proceedings, and concerning which the Petitioner had no knowledge. The court overruled Petitioner's objection to inclusion of these materials.

On the basis of the foregoing, the following questions are presented:

(1) Whether the determination of the Secretary as to the lands covered by Petitioner's leases was in accordance with law as required by the Administrative Procedure Act.

(2) Whether the interoffice memos and letters were properly included as part of the administrative record for judicial review.

(3) Whether the Petitioner has been deprived of its property without due process of law.

STATUTES AND REGULATIONS INVOLVED

25 U.S.C. §§ 396a, 396b

"§ 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938 unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of this section by section 396f of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. May 11, 1938, c. 198, § 1, 52 Stat. 347.

"§ 396b. Public auction of oil and gas leases; requirements

Leases for oil - and/or gas mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of

the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464-475, 476-478, and 479 of this title. May 11, 1938, c. 198, § 2, 52 Stat. 347."

25 C.F.R. § 171.8.

"§ 171.8[1] Lands to be in compact body.

The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys, except that leases covering lode ground may consist of one or more adjoining parallelograms 1,500 feet in length by 600 feet in width, as provided by the United States mining laws. No lease under the regulations in this part shall convey any extralateral rights, and no coal lease shall have a length exceeding 1 mile along the outcrop."

[1]"Prior to 1958, this regulation was numbered 186.8. See 25 C.F.R. § 186.8 (1949). This regulation has been in effect in this form since 1938."

Administrative Procedure Act
5 U.S.C. § 1009(e)

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

applicability of the terms of an agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243."

Constitution of the United States
Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Under date of March 24, 1953, the United States Department of the Interior, Bureau of Indian Affairs, Window Rock Area Office, Window Rock, Arizona, advertised an oil and gas mining lease sale for Navajo Tribal lands in Arizona and Utah. This advertisement set forth the conditions of the sale and described the tracts to be leased. Where the lands were surveyed the tracts were described by official section, township and range. On unsurveyed lands the tracts were described by metes and bounds followed by a provision that the tract "when surveyed probably will be described as follows:", such provision then going on to enumerate certain sections. In some cases, the words "if surveyed" were used rather than "when surveyed" (Joint Appendix, pp. 16-29).

The advertisement further specified that certain conditions were to be incorporated in the leases (Joint Appendix, p. 18). Among these was one that provided in substance that the land was offered on a tract basis and that the acreage stated was for the purpose of computing rentals prior to survey and that thereafter rentals should be computed on the acreage shown by the survey. Another condition required that the lessee must have the leased premises surveyed by a registered land surveyor prior to drilling. These conditions were to be included in all leases whether the lands were surveyed or unsurveyed.

On May 1, 1953, Petitioner was the successful bidder on two tracts of unsurveyed lands involved in this cause. A predecessor of Phillips Petroleum Company and Aztec Oil & Gas Co. (herein referred to as "Phillips-Aztec") was the successful bidder on two unsurveyed tracts describing adjoining lands to the north.

On or about June 25, 1953, a group of the successful bidders at the lease sale requested that a public land survey be made by the Bureau of Land Management of most of the unsurveyed areas covered by the lease sale. Such survey was

to be of township boundaries only with section and quarter section corners established on the perimeter, but was not to include an interior section survey. This survey was made between August 7, 1953 and November 3, 1953 and was accepted and approved as an official survey May 10, 1954. Petitioner was one of the bidders who participated in the cost of the survey.

In September, 1956, Phillips-Aztec had a survey made by a private, registered land surveyor and filed plats of the survey with the appropriate departmental officials. Later in December, 1956, Petitioner had private surveys made which were also filed. These surveys covered the sections enumerated in the leases as indicated by the official township survey rather than the lands covered by the metes and bounds descriptions.

Shortly after filing such survey, Petitioner caused a well to be drilled on one of its leases, which well was completed as a producer in March, 1957, and comprised the initial discovery well in the White Mesa Field. In June, 1957, Phillips-Aztec commenced an offset well to the north. Meanwhile, in April, 1957, one of the companies holding leases in the area circulated to all other operators in the area a proposed agreement providing that where the metes and bounds description did not coincide with the sections indicated by the official survey, the indicated sections would control. This agreement was not executed by Petitioner.

Thereafter Petitioner proceeded to have new surveys made using the metes and bounds descriptions in its leases and plats were filed with the appropriate departmental officials. These metes and bounds descriptions covered the sections enumerated in Petitioner's leases, as indicated by the official survey, and also the south 624 feet of indicated sections 19, 20, 21 and 22 enumerated in the Phillips-Aztec leases. This strip of land, 624 feet wide and four miles long, contains approximately 300 acres and is the subject matter of this controversy. There is no conflict between the metes and bounds descriptions in Petitioner's leases and the metes and bounds descriptions in the Phillips-Aztec leases.

This matter came before the Secretary on intermediate appeal through the office of the Commissioner of Indian Affairs upon (1) the refusal of the Supervisor, United States Geological Survey, Roswell, New Mexico, to approve Petitioner's notice to drill within said strip of land; (2) the action of the Supervisor in approving a notice to drill filed by Phillips-Aztec; and (3) Petitioner's request for a determination of the north boundary of its leases.

Following the Secretary's final decision of November 8, 1961, Petitioner duly proceeded to seek court review thereof in the District Court for the District of Columbia. The jurisdiction of the District Court was invoked under Title XI, Section 306, Code of the District of Columbia; Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. § 1009); and the Declaratory Judgment Act (62 Stat. 964, 28 U.S.C. §§ 2201-2202).

REASONS FOR GRANTING THE WRIT

I.

The issue presented to the Secretary in this case was simply the construction of an oil and gas lease. The particular question was whether the lands leased were those described by metes and bounds or other lands referred to as the lands which would probably comprise the leased lands when surveyed. Petitioner was entitled to have this issue decided according to recognized legal standards. But this the Secretary did not do. Instead, the Secretary reviewed the proceedings of his subordinates in offering the lands for lease and preparing the form of lease and concluded that they intended to lease the lands on the basis of the "when surveyed" sections. Then, as a matter of administrative discretion, he decided that the lands covered by the lease were those that his subordinates intended to lease rather than those described in the lease.

In so proceeding the Secretary did not act in accordance with law as required by the Administrative Procedure Act.

The effect of the Secretary's conduct was to deprive petitioner of property without due process of law, because the area determined to be the leased premises by the Secretary, in the exercise of his administrative discretion, is substantially less than the area of the leases as described by metes and bounds.

The District Court, in ruling that the decision of the Secretary was in accordance with law, violated petitioner's constitutional rights and condoned the Secretary's unlawful exercise of administrative powers. The Court of Appeals in affirming, perpetuated the acquiescence of the court in this unlawful procedure.

Neither the District Court nor the Court of Appeals wrote an opinion, so we do not know what legal theory the court proceeded upon, if any, in upholding the Secretary. On the face of it the record suggests that the lower court proceeded on the assumption that the administrative powers of the Secretary are such as to permit him to disregard recognized legal standards, violate the constitutional rights of those having interests in land over which the Secretary has supervision, and to place him, the Secretary, above the law.

Although the Secretary in his opinion attempts to mask his determination in a legal facade, it is evident from the opinion itself that he exercised his discretion in deciding this controversy. For example, after discussing various provisions contained in the lease forms, the Secretary arrives at an astounding conclusion which he states as follows (Joint Appendix, p. 43):

> "When these conditions are given their full force and effect, it is seen that the contract has more elasticity than Continental appears to recognize."

The Secretary does not say who will determine the use of this "elasticity" but presumably this is to be left up to the sound discretion of the Secretary.

The Secretary's opinion makes reference to a number of things that occurred after the lease sale. With respect to the

meaning of these he reaches another amazing conclusion stated as follows (Joint Appendix, p. 45):

> "Having once asserted a boundary line and acted in accordance therewith to its benefit, it is difficult to see how Continental can later claim a different boundary, particularly when it is in conflict with boundaries recognized as having been established by other lessees and acted upon by them."

Among other things it is difficult to see how Continental was to benefit by the loss of approximately 300 acres of land.

It is also evident from the administrative record that the Secretary, in reaching his decision, exercised his decision-making function rather than his judicial function. For example, when this question first arose it was determined not on the basis of construction of the leases but on the basis of administrative intent. The General Superintendent, Navajo Indian Agency, in his letter of July 8, 1958 (Joint Appendix, p. 82) said:

> "It was the intent of this Agency and, we believe, of the Navajo Tribe that all leases in unsurveyed areas of Navajo Tribal lands would conform to the public land survey by section, township and range. * * *"

The meaning of a legal instrument cannot depend upon the secret intent of one of the parties.

The Commissioner of Indian Affairs, in his opinion of October 31, 1958, predicated his decision on this same claimed intent (Joint Appendix, p. 92):

> "The Intent at the time the tracts were advertised for sale, was to make boundaries conform to the United States public land surveys as required by 25 C.F.R. 186.8 * * *"

The Secretary in his opinion expressly relies on the foregoing comment (Joint Appendix, p. 42):

> "The Commissioner, in his decision, stressed the point that it was the intent of the leasing operation

to make boundaries conform to the United States public land surveys as required by 25 C.F.R. 171.8."

The Administrative Procedure Act clearly contemplates that recognized rules of law are to be applied in administrative adjudications. Contrary to contentions by the Secretary of the Interior, the Administrative Procedure Act applies to decisions of the Department of Interior in the same way that it applies to decisions of any other agency. *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966). This principle is even more appropriate in the present case because only the interests of Petitioner and Phillips-Aztec are affected. The lands involved are under lease to either Petitioner or Phillips-Aztec and neither the Navajo Tribe nor the United States has any interest in the subject matter of this controversy. When a controversy is between private parties and the decision does not affect the administrator's public trust, the judicial function of the administrator requires the highest degree of objectivity and adherence to established principles of law.

II.

When the Secretary submitted the administrative record to the District Court for review, the materials submitted included numerous interoffice memos and letters. The existence and content of these interoffice communications were not known to Petitioner prior to this time. Petitioner objected to inclusion of these materials but the court overruled the objection.

Many of these interoffice memos consisted of opinion and comment on this case by subordinates of the Secretary in the Department of the Interior. This Court has, on many occasions, held that due process is denied where an administrative decision is based, in whole or in part, on evidence acquired by a private investigation of the administrator and such evidence is not made known to the parties with opportunity for explanation and rebuttal. *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1936); *United States v. Baltimore & Ohio Southwestern*

Railroad Company, 226 U.S. 14 (1912); *Interstate Commerce Commission v. Louisville & Nashville Railroad Company*, 227 U.S. 88 (1912); *Crowell v. Benson*, 285 U.S. 22 (1931); *United States v. Abilene & S. R. Co.*, 265 U.S. 274 (1923); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963).

There can be no question but that the Secretary gave credence to, and relied upon, the undisclosed and unproven material contained in these interoffice memos. In one instance the language in the Secretary's opinion is almost identical to, and was obviously borrowed from, one of these memos. In discussing the fact that the oil companies paid for the official survey, the opinion contains the following language (Joint Appendix, p. 42):

> "* * * and it was pointed out in the preliminary discussions that with the township boundaries established, any private or company surveyor could locate wells and lease tract boundaries within such township."

In one of the interoffice memos entitled "Statement of Facts" (Joint Appendix, p. 103) the following language appears (Joint Appendix, p. 104):

> "Mr. Peterson pointed out that any private surveyor or company surveyor could locate wells and the lease tract boundaries within a township. * * * *"

It is obvious that the Secretary accepted, without question, the so-called facts contained in these undisclosed memos.

It is reasonably clear that one theory relied on by the Secretary was that Petitioner and other operators in the area intended that the section survey would control by their actions in requesting and paying for the official survey. The above referred to Statement of Facts is actually an argument attempting to support that theory. For example, this document purports to quote passages of a letter from the Cadastral Engineer to the Chairman of the Navajo Indian Survey Committee pointing out some of the expected discrepancies under the proposed plan of survey between the sections and

the lease tracts as described in the lease sale (Joint Appendix, p. 105). Presumably the inference is that these anticipated discrepancies were clearly brought to the attention of the companies and there were no complaints. Of course the obvious defect and danger in relying on undisclosed evidence of this nature is that there is no proof, or even an allegation, that anyone except the chairman ever saw this letter. This is also true with respect to the quotations from the survey instructions set forth in this Statement of Facts (Joint Appendix, p. 107).

In reviewing an administrative decision under the Administrative Procedure Act, only the administrative record may be considered and new evidence may not be received. *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Company*, 308 U.S. 241 (1939); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1942).

Moreover, the administrative record to be reviewed must be a proper record. In *Norris & Hirshberg v. Securities and Exchange Commission*, 85 App. D.C. 268, 163 F.2d 689, 693 (1947), certiorari denied, 333 U.S. 867 (1948), the court defined the proper content of the record as follows:

> "In considering a case such as this the Commission might have before it four sorts of documents: the pleadings, a transcript of the evidence, briefs of counsel, and memoranda prepared by members or subordinates. It is well established that only the pleadings and the evidence constitute the record upon which the decision must be based. Briefs and memoranda made by the Commission or its staff, are not parts of the record. Our duty on appeal, being only to say whether the record justifies the order, is therefore only to examine the pleadings and the evidence. What may be said by counsel in their briefs, or by a Commissioner or a subordinate in a memorandum concerning the record, does not properly come before us."

To allow undisclosed interoffice memos to be included in the administrative record for review is equivalent to receiv-

ing new evidence and is a clear violation of the established procedures for court review.

In summary Petitioner contends:

(1) That the Secretary of the Interior, in rendering his decision in this case, did arbitrarily and capriciously fail to exercise his judicial function in conformity with the requirements of the Administrative Procedure Act.

(2) That the Secretary, in rendering his decision in this case, relied on evidence and facts which were not disclosed to the parties with opportunity for rebuttal.

(3) That the actions of the Secretary in this case deprived Petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

(4) That the District Court, in admitting the undisclosed interoffice memos into evidence, acted contrary to established procedures for review of an administrative decision under the Administrative Procedure Act, and in conflict with applicable decisions of this court.

(5) That the Circuit Court of Appeals, in confirming the judgment of the District Court without opinion, which had in turn confirmed the opinion of the Secretary without opinion, must be assumed to have adopted and approved the actions of the District Court and the opinion and actions of the Secretary.

(6) That the Circuit Court of Appeals, in approving the actions of the District Court and the Secretary of the Interior, has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure, as to call for an exercise of this court's power of supervision.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 20,362 September Term, 1966.

CONTINENTAL OIL COMPANY,
Appellant,

v.

STEWART L. UDALL,
Secretary of the Interior,
et al.,
Appellees.

Civil 366-62

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Edgerton, Senior Circuit Judge, and Robinson, Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellees Phillips Petroleum Company and Aztec Oil & Gas Co. recover from appellant the taxable cost of printing their brief in this case, and have execution therefor.

Per Curiam

Dated: February 10, 1967

[Filed March 15, 1967]

[Caption omitted]

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the court that appellant's aforesaid petition is denied.

Per Curiam.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PHILLIPS PETROLEUM COMPANY AND AZTEC OIL & GAS CO.

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INDEX

	Page
Questions Presented	1
Statutes and Regulations Involved	2
Statement	2
Argument	7
Conclusion	14

CITATIONS

Cases Cited:

Chapman v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621 10
First Wisconsin Bankshares Corp. v. *Board of Governors*, 325 F.2d 946 (7th Cir. 1963) 12
Iselin v. *C. W. Hunter Co.*, 173 F.2d 388 (5th Cir. 1949) 11
Midwest-Radiant Corp. v. *Hentze*, 171 F.2d 635 (7th Cir. 1948), *cert. denied*, 336 U.S. 952 11
Northwest Bancorporation v. *Board of Governors*, 303 F.2d 832 (8th Cir. 1962) 12
Service v. *Dulles*, 354 U.S. 363 9
Udall v. *Tallman*, 380 U.S. 1 10
United States v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33 .. 14
Vitarelli v. *Seaton*, 359 U.S. 535 9

Statutes:

Act of May 11, 1938, Sec. 2, 52 Stat. 347, 25 U.S.C. § 396b 3
Act of May 11, 1938, Sec. 4, 52 Stat. 348, 25 U.S.C. § 396d ..2, 3, 4
Administrative Procedure Act, § 10, 5 U.S.C.A. § 706 (Spec. Supp. 1966) 9

Regulations:

25 C.F.R. § 171.8 (1967) 2, 4, 7, 9
25 C.F.R. Part 171 3

Miscellaneous:

3 Corbin, *Contracts* § 558 (1960) 11
4 Williston, *Contracts* § 623 (3d ed. 1961) 11

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PHILLIPS PETROLEUM COMPANY AND AZTEC OIL & GAS CO.

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior erred in denying petitioner permission to drill on certain Indian lands on the ground that the land was not within petitioner's leases but rather within the leases of these respondents.

2. Whether an administrative determination not required by statute or by the Constitution to be made on

a formal evidentiary record, and with respect to which petitioner never requested a trial-type hearing, was vitiated by the administrator's consideration of certain not reasonably disputable background facts.

STATUTES AND REGULATIONS INVOLVED

Act of May 11, 1938, § 4, 52 Stat. 348, 25 U.S.C. § 396d, provides in pertinent part:

> "All operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior."

25 C.F.R. § 171.8 (1967) provides:

> "The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys * * * ."

STATEMENT

This action was instituted by petitioner in the United States District Court for the District of Columbia to review a decision of the Secretary of the Interior affirming an administrative refusal of permission to petitioner to drill for oil on a certain tract of land. The refusal was based on a determination that the land was not covered by two Navajo Tribal leases acquired by petitioner at a lease sale administered by the Department of the Interior. That determination was, in turn, based on a finding that contrary to petitioner's claim, those leases properly construed conveyed the lands described therein by sections, in accordance with the system of public-land surveys, and not according to conflicting metes and bounds descriptions, also found in the leases.

Respondents Phillips Petroleum Company ("Phillips") and Aztec Oil & Gas Co. ("Aztec") are the joint owners of two Tribal leases which lie directly to the north of petitioner's leases and which would be encroached upon if petitioner's claim were to prevail. Phillips and Aztec were granted leave to intervene in this action in the District Court as parties defendant. (J.A. 50).

The District Court, after extensive briefing and argument by the parties, dismissed the action on the merits, concluding that the Secretary's decision "is not arbitrary or capricious, does not constitute an abuse of discretion and is not otherwise unlawful" and "is supported by substantial evidence on the administrative record." (J.A. 166). On petitioner's appeal, the judgment of dismissal was affirmed per curiam without opinion. (Pet. App. A-1). Petitioner's petition for rehearing was denied. (Pet. App. A-2).

The leases involved in this action came into being as a result of an advertisement for bids for oil and gas leases on 214 tracts of Navajo Tribal Lands which was issued by the Department of the Interior in March, 1953. (J.A. 16-28). The advertisement stated that "each lease will be issued to the highest responsible qualified bidder in accordance with the Act of May 11, 1938 (52 Stat. 347), and the regulations approved May 31, 1938, as amended or supplemented (25 C.F.R. Part 186)."[1] (J.A. 17). Section 2 of the Act of May 11, 1938, 25 U.S.C. § 396b, provides that such leases are to be offered for sale to the highest bidder "upon such terms and subject to such conditions as the Secretary of the Interior may prescribe." (Pet. 3). Section 4

[1] These regulations are now Part 171 of 25 C.F.R.

of the Act, 25 U.S.C. § 396d, provides that operations under these leases "shall be subject to the rules and regulations promulgated by the Secretary of the Interior." And one of the regulations issued by the Secretary (now 25 C.F.R. § 171.8) provides that "the area covered by a lease * * * shall conform to the system of public-land surveys * * * *."

Among the 214 tracts referred to in the advertisement were Tracts 87, 88, 96 and 97. All of these tracts were described by metes and bounds, and the description then concluded (for Tract 88; the description of the other tracts being in the same form):

> "Tract No. 88 when surveyed probably will be described as follows:
>
> "Sections 29, 30, 31 and 32 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres." (J.A. 25; see J.A. 24-25, 26-27, 27).

The advertisement further stated that the following conditions, among others, "will be incorporated in the leases":

> "1. This land is offered on a tract basis and the bids shall not be on an acreage basis. The acreage herein stated is for the sole purpose of computing annual rental prior to survey of the land. Thereafter the rental shall be computed on the acreage as shown by the survey. * * *
>
> "2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U.S. Geological Survey, P. O. Box 997,

> Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat." (J.A. 18-19).

Petitioner was the successful bidder for leases on Tracts 88 and 97, and the predecessor of Phillips and Aztec was the successful bidder for leases on Tracts 87 and 96. (J.A. 5, 6, 52, 53). Each lease, as finally entered into between the lessee and the Navajo Tribal Council and as approved by the Department of the Interior, described the land covered by the lease in the same manner as it had been described in the advertisement and contained the conditions which the advertisement stated would be incorporated in the leases. (J.A. 34-37, 98-99, 102-03). In addition, each lease contained an agreement by the lessee "to abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases." (J.A. 109-10).

Before these leases were approved, an official public-land survey of the area was made by the Bureau of Land Management.[2] This survey, which was paid for by a group of oil companies, including petitioner (J.A. 12), was performed "under special instructions for Group 386, Utah, dated July 28, 1953." (J.A. 163). These instructions stated that "the purpose of the work is to provide official township boundary surveys to facilitate subsequent identification of individual leases

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[2] Petitioner's leases were approved on December 10, 1953 (J.A. 5, 52), and the leases of Phillips and Aztec's predecessor were approved on January 8, 1954. (J.A. 6, 52-53). The survey was conducted from August 7 to November 3, 1953. (J.A. 163).

on the ground." (J.A. 160). The instructions clearly showed that the lower tier of sections in the tracts for which petitioner had been the successful bidder would be fractional sections and would not coincide with the metes and bounds descriptions of the tracts. (J.A. 161-62).

This official survey was approved on May 10, 1954. (J.A. 163). Thereafter, pursuant to condition number 2 of the leases (pp. 4-5, *supra*), petitioner filed surveys of the tracts of land which it had leased. (J.A. 76, 77). These surveys, which conformed to the approved Bureau of Land Management survey of township boundaries, stated on their face that they were of Tracts 88 and 97, showed that the boundaries of these tracts were based on the section description in the leases and made no mention of the metes and bounds descriptions of the tracts. (*Ibid.*). On the basis of these surveys, petitioner was granted permission to drill certain wells. (J.A. 45).

In August, 1957, however, petitioner reversed its position as to the area covered by its leases and filed a plat which purported to represent the survey of the metes and bounds description in the leases. (J.A. 9-10, 78). Petitioner then requested permission to drill a well on land which it claimed to be within this metes and bounds description. (J.A. 10). This request was denied by the Regional Oil and Gas Supervisor, which denial was upheld by the Area Director (J.A. 39), on the ground that the well would not be located on land covered by petitioner's leases but rather on land included within these respondents' leases. (J.A. 85-86). Phillips as operator was granted permission to drill on this land. (J.A. 84).

Petitioner appealed from these rulings to the Commissioner of Indian Affairs (J.A. 61-63), who ruled against petitioner. (J.A. 90-95). An appeal was then taken to the Secretary, who affirmed the decision of the Commissioner, holding that the section description in petitioner's leases was controlling over the metes and bounds description because the former description conformed to the system of public-land surveys, as required by 25 C.F.R. § 171.8, whereas the latter description did not; because certain conditions in the leases could be given meaning only if the section description controlled; and because petitioner had displayed by its actions a recognition that its land was leased by section numbers. (J.A. 38-46).

Petitioner's challenge to this administrative determination of the Secretary was rejected by the courts below, and petitioner now seeks the intervention of this Court.

ARGUMENT

The Regional Oil and Gas Supervisor, U.S. Geological Survey, the Area Director of Indian Affairs, the Commissioner of Indian Affairs, the Secretary of the Interior, the District Court and the Court of Appeals, after having given full consideration to petitioner's claim, have all rejected that claim. It does not warrant review by this Court.

Petitioner does not contend that the judgment of the Court of Appeals is in conflict with any decision of any other court. This case presents no novel or important question of law. It has no impact whatever upon the administration of the mineral leasing statutes by the Department of the Interior. It does not touch upon the Department's responsibilities vis-a-vis the Indians

whose lands are leased.[3] As petitioner states, "The issue presented to the Secretary in this case was simply the construction of an oil and gas lease." (Pet. 8). Whether or not that construction was valid—and it clearly was—it is manifestly not a question meriting this Court's attention.

Petitioner, in asking this Court to review the Secretary's decision, claims that the Secretary did not apply "recognized legal standards" in resolving the controversy (Pet. 8) and also that the Secretary based his decision on material that should not have been included in the administrative record. There is no basis for either claim.

1. It is difficult to comprehend precisely the nature of petitioner's first complaint. Certainly, petitioner's statement that "the Secretary, in reaching his decision, exercised his decision-making function rather than his judicial function" (Pet. 10) is of no help. Basically petitioner seems to be complaining that the Secretary's decision was unlawful because, it is claimed, while the Secretary purported to apply legal standards, he did not in fact do so but instead exercised his discretion in resolving the controversy. In support of this conten-

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[3] The Navajo Tribal Council, with whom petitioner entered into the leases, was not named as a party defendant, nor did it seek to become a party to this action. The revenues to be derived by the Council from the leases do not depend upon whether the land involved here is held to be encompassed within petitioner's or Phillips-Aztec's leases.

As stated by petitioner, "The lands involved are under lease to either Petitioner or Phillips-Aztec and neither the Navajo Tribe nor the United States has any interest in the subject matter of this controversy." (Pet. 11).

tion, petitioner cites (a) the Secretary's statement that the lease "has more elasticity" than petitioner claimed (J.A. 43), (b) the fact that reference was made in the Secretary's opinion to matters that occurred after the lease sale which demonstrated that petitioner recognized that the land was leased in accordance with the section description, and (c) the statement in the opinion as to the agency's intent that the leases conform to the requirements of applicable regulations. We are at a loss to understand how these statements can be said even to suggest that the Secretary's decision was in any way improper.

Far from the Secretary's decision being unreasonable or lacking support,[4] it is not an overstatement to say that any other decision would have been unthinkable. First of all, the decision was compelled by the fact that only if the section description controlled would the leases conform to the regulations referred to in the advertisement, and by which the lessee specifically agreed to abide, that "the area covered by a lease * * * shall conform to the system of public land surveys * * * ." (25 C.F.R. § 171.8). This mandatory regulation is binding not only on the lessee but on the Secretary as well. *See, e.g., Vitarelli* v. *Seaton,* 359 U.S. 535, 539-40; *Service* v. *Dulles,* 354 U.S. 363. *See*

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[4] The standard governing review of the Secretary's decision is that set forth in the Administrative Procedure Act, the statute under which this action was brought. (J.A. 3). Under § 10 of the APA (now 5 U.S.C.A. § 706 (Spec. Supp. 1966)), that standard is whether the "action, findings, and conclusions" of the Secretary are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This is the standard applied by the District Court. (J.A. 166).

also Chapman v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 629 (dictum). Once having determined that the regulation was applicable—a determination that can be overturned only if unreasonable, not merely if incorrect, *see Udall* v. *Tallman*, 380 U.S. 1, 4; *Chapman* v. *Sheridan-Wyoming Coal Co., supra*—the Secretary was not only free to follow the regulation but would have erred in disregarding it. It is untenable for petitioner to suggest that the Secretary's reliance on the intent to comply with the regulation was improper.

Second, the Secretary relied on the fact that the advertisement and leases, in addition to describing the land by metes and bounds, contained conditions stating that the land was offered on a tract and not an acreage basis and requiring that a survey be taken to establish a "tie * * * with the nearest United States Public Land Survey." These conditions and the requirements of the regulations, said the Secretary, would be meaningless under petitioner's view of the leases. (J.A. 43). On the basis of this determination, clearly a matter within the administrative expertise of the Interior Department, the Secretary concluded that the lease could not be viewed, as petitioner claimed, as an unambiguous conveyance by metes and bounds. How this conclusion is in any way erroneous or improper is not explained by petitioner.

Finally, the Secretary relied on petitioner's recognition, after the leases had been entered into, that the land had been leased to it by section designation and not by metes and bounds. The Secretary also noted that petitioner had acted to its benefit in accordance

with its original view as to the boundary of its leases.[5] The Secretary clearly did not err in relying on a party's own practical construction of the lease; courts traditionally have done so. *See, e.g.*, 3 Corbin, *Contracts* § 558 (1960); 4 Williston, *Contracts* § 623 (3d ed. 1961); *Iselin* v. *C. W. Hunter Co.*, 173 F.2d 388, 392 (5th Cir. 1949); *Midwest-Radiant Corp.* v. *Hentze*, 171 F.2d 635, 638 (7th Cir. 1948), *cert. denied*, 336 U.S. 952.

Each of the foregoing three grounds of decision would itself be sufficient to support the Secretary's determination. Together, they render that determination unassailable.

2. Petitioner's second claim is that the administrative record should have been limited to pleadings and evidence and that the briefs of the parties and staff memoranda were erroneously relied upon by the Secretary. This contention makes no sense in the circumstances of this case.

Petitioner does not contend that the Secretary of the Interior was required to conduct a formal quasi-judicial evidentiary hearing in this case. Such a hearing was not required by any statute or regulation. Instead, the administrative determination was made after the opportunity had been given to all interested parties to submit informally any facts, data, or argu-

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[5] While petitioner purports to be unable to understand this conclusion of the Secretary (Pet. 10), the Secretary's decision makes it perfectly clear:

> "In December, 1956, having filed its survey plat showing sections, Continental applied for and was given permission to drill the Davis No. 1 Well. This well was a producer by March, 1957, and it was not until August, 1957, that Continental submitted its survey plat by metes and bounds. * * *" (J.A. 45).

ment which they believed should be considered by the Secretary in passing upon petitioner's claim. No contention has been made by petitioner that this informal procedure was not sufficient and that a formal evidentiary hearing should have been instituted. Indeed, while petitioner originally requested "a hearing" before the Commissioner of Indian Affairs (J.A. 62), that request was withdrawn by petitioner before the Commissioner's decision issued. (J.A. 91). The only other procedural request made by petitioner was for oral argument before the Secretary, a request that was granted. (J.A. 46).

This is not a case, therefore, where the facts are developed by testimony under oath and cross-examination and where, according to the authorities cited by petitioner, the administrator is precluded from relying on facts not so developed. Here, where no evidentiary hearing was held, neither the Secretary nor the reviewing courts were compelled to disregard the factual material submitted informally to the Secretary. Compare *First Wisconsin Bankshares Corp.* v. *Board of Governors,* 325 F.2d 946 (7th Cir. 1963); *Northwest Bancorporation* v. *Board of Governors,* 303 F.2d 832 (8th Cir. 1962).

Moreover, petitioner has not shown how it could have been in any way prejudiced by the fact that what it calls "interoffice memos" were included in the file on the basis of which the Secretary made his decision. (Pet. 11). Generalities aside, petitioner complains of the statement in the Secretary's decision that it was recognized that the official survey of township boundaries would permit the individual lease boundaries to be located and of the fact that a passage in a document before the Secretary, not referred to in his opinion,

indicated that it was recognized, before the survey was undertaken, that there would be discrepancies in some of the leases between the section and metes and bounds descriptions.

It is perfectly clear, however, that there can be no real dispute as to the basic facts involved, and that petitioner could not conceivably have been prejudiced by the action of which it complains. There can be no dispute that the official Bureau of Land Management survey was conducted "under special instructions for Group 386, Utah, dated July 28, 1953"; the survey plat so states. (J.A. 163). There can be no dispute that the instructions contained in the record are those referred to on the survey plat. (J.A. 159). There can be no dispute that these instructions reveal that "the purpose of the work is to provide official township boundary surveys to facilitate subsequent identification of individual leases on the ground" and that there would be discrepancies in some of the leases.[6] (J.A. 160). Finally, there can be no dispute that petitioner was one of the companies that paid for the survey; petitioner so acknowledged in its Complaint in this action. (J.A. 12).

Of course, these facts were not proven in any formal sense, but none of the facts relied on by the Secretary was so proven. The dispute was resolved in an informal manner by the Secretary. Petitioner did not, dur-

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[6] Petitioner states that "Presumably the inference is that these anticipated discrepancies were clearly brought to the attention of the companies and there were no complaints." (Pet. 13). There is nothing in the decision of the Secretary which remotely suggests that he drew or relied upon any such inference. Indeed, there is no reference whatever in the Secretary's opinion to "anticipated discrepancies."

ing the course of the administrative proceedings, demand a formal evidentiary hearing and it may not be heard now to say that such a hearing was required. *See, e.g., United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33.

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 234

CONTINENTAL OIL COMPANY, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, PHILLIPS PETROLEUM COMPANY AND AZTEC OIL & GAS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR STEWART L. UDALL IN OPPOSITION

OPINION BELOW

Neither the court of appeals nor the district court wrote an opinion. The findings of fact and conclusions of law of the district court appear at J.A. 165. The opinion of the Secretary of the Interior (J.A. 38) is reported at 68 I.D. 337.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1967 (Pet. App. A–1), and a petition for rehearing was denied on March 15, 1967 (Pet. App. A–2). The petition for a writ of certiorari was

269-530—67

filed on June 9, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior was correct in defining the area covered by certain oil and gas leases of Indian tribal lands according to public land sections rather than by metes and bounds, where both descriptions appeared in the leases.

2. Whether certain materials were improperly included in the administrative record.

STATEMENT

The Bureau of Indian Affairs advertised the sale by competitive bidding of oil and gas leases covering 528,000 acres of Navajo tribal lands in Arizona and Utah (J.A. 16). Part of the area had been surveyed under the standard federal rectangular survey system; part was unsurveyed. The area was offered for leasing in 214 numbered, rectangular tracts (J.A. 16, 157). In the surveyed area, each tract was described by four section numbers in a specific township and range. In the unsurveyed area, each tract was described by metes and bounds whose courses and distances approximated the normal acreage and location of four regular sections as projected from the adjacent surveyed area (J.A. 22–28, 155, 157), and each description also stated that the tract "when surveyed probably will be described as follows," giving specific section, township and range designations from that projection.

The advertisements stated that (1) the land was offered on a tract, not on an acreage, basis; (2) the

acreage stated was solely for the purpose of computing annual rentals prior to survey; (3) before permission to drill wells would be granted the lessee must have the premises surveyed, boundaries posted with substantial monuments and a tie established with the nearest United States Public Land Survey; and (4) the leases were subject to existing and future regulations of the Secretary of the Interior (J.A. 17–19). The regulations then (and now) provided, 25 C.F.R. 186.8 (now 171.8): "The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys * * *."

Petitioner submitted successful bids on two unsurveyed tracts. Predecessors of respondents Phillips Petroleum Company and Aztec Oil & Gas Company successfully bid in the two abutting, unsurveyed tracts to the north. However, before any of these leases were issued, a group of oil companies which had bid successfully asked the Bureau of Land Management to conduct a public land survey of the area. The survey was to be of township boundaries only, with section and quarter-section corners established on the perimeter but no interior sections laid out. It was understood that any company surveyor could then accurately locate the lease tract boundaries within the townships.

The Bureau undertook the survey. In its instructions to the surveyor, it pointed out, as had been discussed with the chairman of the oil companies' committee, that the existing survey of the adjacent area (into which the survey must be tied) contained a north-south measurement shortage of 7.40 chains and that, in conformity with accepted practice, the neces-

sary adjustment should be placed in the south tier of quarter sections across particular townships (J.A. 160–162). When the survey was made, the oil companies, including petitioner, paid for it (J.A. 42). The adjustment had the effect of moving the common boundary between petitioner's tracts and Phillips-Aztec's tracts 624 feet south into petitioner's area as defined by the metes and bounds description.[1]

A few days before the survey was completed, leases were issued to petitioner and Phillips-Aztec embodying the terms and descriptions of the advertisement for sale (J.A. 30–37, 42, 64–65, 92). Three years later, petitioner, as required before commencing drilling, filed a survey plat showing its tracts in terms of the public lands sections, and on that basis was given permission to drill and brought in a producing well (J.A. 39, 42, 45).

Petitioner later filed a second plat showing its tracts in terms of the metes and bounds descriptions, sought permission to drill within the 624-foot-wide strip (shown by this plat to be within its leasehold), and urged denial of a permit sought by Phillips-Aztec to drill there (J.A. 39, 45). Petitioner's application was denied and that of Phillips-Aztec granted (J.A. 83–87, 90–95, 38–46). The district court concluded that the Secretary's decision was lawful and supported by the administrative record (J.A. 165–166), and the court of appeals affirmed without opinion (Pet. App. A–1).

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[1] Since their common boundary extends for four miles, this amounts to about 300 acres (J.A. 39, 42).

ARGUMENT

The decision of the court of appeals is correct, and there is no basis for further review.

1. Both the advertisement for sale and the leases indicated unmistakably that the lease-tract boundaries were to conform to the system of public land surveys, as required by the Secretary of the Interior's regulations. Petitioner showed its understanding of this requirement when it filed the first survey plat, which described the lease-tracts according to the official survey. Phillips-Aztec shared this understanding, as did the other oil companies—including petitioner—in asking for an official survey at the outset. It was and is obvious that the public land survey must stand as the permanent survey of the area. Great confusion would result if a second monumented survey in the area were adopted for purposes of the oil and gas leases.

2. Petitioner asserts that certain materials—interoffice memoranda and other internal documents of the Department of the Interior—should not have been included in the administrative record (Pet. 11–14). The point might be well taken had there been formal administrative hearings here, with testimony by witnesses, cross-examination, and other formal evidence. But since no formal hearing was held—or requested—at the administrative level,[2] the Secretary was entitled to examine the Department's administrative file and rely on the materials therein in reviewing the

[2] Since no statute requires a hearing, the provision of the Administrative Procedure Act for a determination on the hearing record was not applicable. 5 U.S.C. 554(a); *Northwest Bancorporation* v. *Board of Governors*, 303 F. 2d 832, 842 (C.A. 8).

action of his subordinates. Petitioner, we stress, was not refused access to these documents, and all materials submitted by petitioner were received and considered. Accordingly, it was proper to include in the administrative record the documents which the Secretary considered in making his decision. This was, indeed, essential for intelligent review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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